

BEFORE THE  
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

J. K. SCHMIDT  
(Claimant)

PRECEDENT  
DISABILITY DECISION  
No. P-D-455  
Case No. D-86-00259

S.S.A. No.

THOMAS TEMPORARIES  
(Self-Insurer)  
c/o Voluntary Plan Administrators, Inc.

Voluntary Plan No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. VN-DC-08891

The Department appealed from the decision of the administrative law judge which held that the Department was not entitled to reimbursement from the voluntary plan for disability insurance benefits paid to the claimant pursuant to section 2712 of the Unemployment Insurance Code.

STATEMENT OF FACTS

The employer provides employees to clients on a temporary basis. It maintains a voluntary plan for disability insurance coverage for its employees.

The claimant has worked exclusively for the employer since June 1985. The claimant, who works as an office accountant, is dispatched by the employer on an as-needed basis. The duration of the claimant's assignments have ranged from one day to three months.

On February 17, 1986, the claimant was dispatched on an assignment that was expected to last until February 25, 1986. However, when the claimant reported to work on February 18, 1986, he was told by the client that he was not needed. The client cancelled the job order. The claimant was paid for four hours on that day.

The claimant did not work on February 19. On February 20, 1986, the claimant became seriously ill and was hospitalized, and on March 18 underwent surgery. He remained disabled until approximately May 1, 1986.

The claimant applied for unemployment compensation disability benefits with the Department. The Department paid the claimant disability insurance benefits and sought reimbursement from the voluntary plan. The voluntary plan denied coverage, and the appeal to the administrative law judge followed.

The employer would have continued to dispatch the claimant to additional jobs after February 18, 1986 but for the claimant's illness. The employer considered the claimant to be separated from its employ upon completion of each of his job assignments such as occurred on February 18.

Article I.A. of the employer's voluntary plan provides in part that all California employees of the employer, both permanent and temporary, are eligible for coverage under the plan. Article VI.A. of the plan provides as follows:

"An employee's coverage will terminate:

- A. On the date of termination of employment by termination of the employer-employee relationship; or on the 15th day following a leave of absence without pay or a layoff without pay."

The voluntary plan takes the position that when the claimant completed his assignment on February 18, 1986, the employment relationship between the claimant and the employee was terminated at that time for all purposes.

#### REASONS FOR DECISION

Section 3254 of the Unemployment Insurance Code provides that an employer may provide disability benefit coverage for its employees by way of a voluntary plan provided that the rights afforded to the covered employees are greater than those provided under the state disability plan.

Section 3253 of the code provides that an individual shall not be entitled to benefits from the state disability fund for a disability which commenced while the claimant is covered by a voluntary plan.

Section 2712-1, Title 22, California Administrative Code, establishes the procedure where an individual files a disability benefit claim with the Department, which the Department believes is a rightful charge to the voluntary plan. The Department will forward a copy of the claim to the voluntary plan insurer, requesting that benefits be paid under the plan. If the insurer denies coverage, it shall so notify the Department and claimant. The Department in that case will continue paying benefits to the claimant, and may thereafter appeal the question of coverage. That is what occurred in this case.

Section 2626 of the Unemployment Insurance Code provides that an individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.

In the present case, the claimant filed his disability insurance claim against the Department which paid benefits upon determining the claimant unable to perform his regular and customary work. The Department contends that it is entitled to reimbursement from the voluntary plan for benefits paid to the claimant because the claimant was on a layoff without pay at the commencement of his disability. Therefore, the claimant comes within the extended coverage provisions of the plan cited above; this provision is drawn verbatim from section 3254-2 of Title 22, California Administrative Code. The voluntary plan maintains that a termination of employment occurred when the claimant completed his assignment on February 18, 1986, and that he was therefore no longer covered by the plan.

In Appeals Board Decision No. P-B-275 the Appeals Board held that an employment relationship is a contractual one, whether expressed or implied. The Appeals Board concluded that the termination of an employment relationship in keeping with a specific contract of employment is binding upon the employer and the employees. While it may be that a new contract would renew the employment relationship, neither party is legally obligated to offer or accept such contract. The claimant completed a specific period of employment and therefore became unemployed under the terms of the agreement and was not disqualified under section 1256 of the code.

In Appeals Board Decision No. P-B-373 the Appeals Board held that an employee who works as an "on-call" or "extra" employee and who is laid off for an indefinite period is not disqualified from unemployment insurance benefits.

In Appeals Board Decision No. P-R-29 the Board held that an indefinite layoff constituted a termination of employment and that a recall constituted a new offer of employment. In Appeals Board Decision No. P-B-161 the Board held that there was no termination of employment where the layoff was for a definite period of 28 days.

In this case, it is undisputed that the claimant had completed his assignment when the employer's client told him he was no longer needed. The claimant had worked for the employer on an on-call basis for the previous eight months and had a reasonable expectation of being referred to future assignments. However, he had no assurance or guarantee that he would again work for the employer. He had no definite recall date but was laid off indefinitely. The employer was under no obligation to offer the claimant work and he was under no obligation to accept work offered by the employer. Accordingly, upon completion of his assignment on February 18, 1986, the employment relationship between the claimant and the employer was severed; a termination of employment occurred.

Article I.A. of the voluntary plan, as noted above, provides that an employee's coverage will terminate on the date of termination of employment by termination of the employer-employee relationship. As we find that the employment relationship was terminated in this case prior to the commencement of the claimant's disability, the State Disability Fund is not entitled to reimbursement from the voluntary plan. Had the onset of the disability begun prior to termination, even though a claim had not been filed, the voluntary plan would have been liable (Appeals Board Decision No. P-D-426).

We recognize that this case presents a situation where the claimant has contributed to the voluntary plan, but the State Disability Fund rather than the voluntary plan is paying benefits to the claimant. However, other situations will inevitably arise where a newly hired employee who has made no contributions to the voluntary plan will become disabled, and the voluntary plan will pay benefits rather than the State Disability Fund to whom the claimant paid contributions.

DECISION

The decision of the administrative law judge is affirmed. The Department is not entitled to reimbursement from the voluntary plan for the benefits paid to the claimant.

Sacramento, California, May 7, 1987.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT L. HARVEY, CHAIRMAN

GEORGE E. MEESE

J. RICHARD GLADE

DEBRA A. BERG

JAMES S. STOCKDALE

DISSENTING -  
Written Opinion Attached

LORETTA A. WALKER

DISSENTING OPINION

I respectfully dissent from the decision of my colleagues.

The majority's recitation of the rule in Precedent Decisions Nos. P-B-275 and P-B-373 betrays its confusion in this matter. Those cases address the issue of when a contract of employment terminates for purposes of determining a claimant's eligibility for unemployment insurance benefits under sections 1256 or 1257(b) of the code. I fully agree with the holding in those precedent decisions and particularly their application to workers in the temporary services industry. However, the present case does not concern eligibility for benefits. The issue presented addresses only if the State Disability Fund or the voluntary plan shall be liable for disability insurance benefits paid to the claimant.

Section 3254 of the code, cited by the majority, provides in part that employees, for purposes of voluntary plans for disability insurance, includes individuals in partial or other forms of short-time employment and employees not in employment, as the Department shall prescribe by regulations.

The Department's implementing regulation is found at section 3254-2(d) of Title 22, California Administrative Code, which provides in part as follows:

"Coverage under a voluntary plan may be terminated upon the withdrawal of an employee from the plan or the termination of his employment. Employment shall be deemed terminated by a termination of the employer-employee relationship or by a leave of absence without pay or a layoff without pay if the leave or layoff extends for a period of more than two weeks before the disability commenced, except that a voluntary plan may extend its benefits for a longer period after separation from work."

From the statute and the regulation, as well as Article VI.A. of the voluntary plan, it is clear that a termination of employment for purposes of coverage under the voluntary plan does not occur in a case of a temporary layoff of less than 15 days. This may be a period when the employee is considered not in employment, as described in the statute. Only a quit or a discharge or an unpaid leave of absence or a layoff in excess of 14 days terminates the employment relationship for purposes of coverage under the plan.

In the present case, the claimant's disability occurred within two days of his being laid off. The layoff was only temporary as the claimant had established a history of intermittent employment with this employer. Therefore, I would find that there was no termination of employment, as that term is used in the regulation and the voluntary plan, after the claimant last worked on February 18, 1985 and that the claimant was covered by the voluntary plan on February 20, 1985 when he became disabled.

In applying the standard for termination of employment set forth in Precedent Decisions Nos. P-B-275 and P-B-373, the majority loses sight of the real issue in this case. In so doing, my colleagues ignore the clear direction of section 3254 of the code. The voluntary plan provision is in keeping with section 3254 and the implementing regulation. These provisions allow for coverage in clearly defined situations including a layoff without pay, a circumstance which would constitute a termination of employment for unemployment insurance eligibility purposes.

I would reverse the decision of the administrative law judge and find the voluntary plan liable for benefits paid to the claimant.

LORETTA A. WALKER